

beneficial impacts in the management of their workload. For example, the Fifth Circuit has instituted an “Augean” panel, which solely deals with the disposal of motions. Judge Higginbotham advocated the practice of conference calendars,⁹ rejecting as “unfounded” concerns about their use creating some emergency mechanism. He indicated that this process is “quicker and faster”, and has improved the quality of decision-making “because you have three judges in one room and they are able to collegially talk about it and focus” on a case. Some judges felt that summary calendars¹⁰ that provide no argument can promote significant efficiencies in a court, while ensuring that justice is rendered. Judge Silberman of the District of Columbia Circuit confirmed that the summary calendar process is an effective way in which to manage or dispose of cases, and disputed any inference that cases were being decided on summary calendar rather than on a full-merits argument because of backlog problems. In fact, Judge Silberman testified that he had “never seen [the District of Columbia Circuit] handle cases through the summary calendar that appropriately should be handled by oral argument.”

Some judges testified that their own internal court procedures produce efficiencies in their courts. For example, the Second Circuit has a policy of “aggressively enforcing procedural rules such as deadlines and of defaulting parties who fail to meet them.” Judge Winter indicated that while the Second Circuit is “quite liberal” in reinstating defaulted appeals, “the aggressive attention to procedural rules sends the message to counsel that the court is in earnest about moving the business.” There is no question that the parties to a lawsuit have an important role to play in the smooth and efficient functioning of a court and the prompt resolution of litigation.

Judges also testified that they can manage their time more effectively by limiting oral argument. Some circuits, like the Third Circuit, have adopted a policy of only granting oral argument where judges on the deciding panel believe oral argument is absolutely necessary, thereby speeding up the resolution of non-argued cases and freeing up judge time for more complex cases. On the other hand, the Second Circuit allows oral argument in every case because, according to Judge Winter, “you don’t gain much time by not having oral argument in some cases.” The Sixth Circuit provides oral argument in every case in which the litigants are represented by counsel and oral argument is requested. While some judges believe that “there should be a three-judge panel listening to oral arguments in every social security case or prisoner petition,” Judge Higginbotham argued that these views “lack a sound foundation,” particularly because staff attorneys can competently deal with these kinds of cases and process them for an efficient judicial review.

⁹ According to this practice, staff attorneys review the briefs submitted in uncomplicated pro se cases and make recommendations to a 3-judge panel prior to oral argument. A decision on the case needs to be unanimous or else the case proceeds to oral argument.

¹⁰ This practice involves a review of uncomplicated cases, where the parties have not requested oral argument, and the law is well-settled and involves straight-forward issues. Staff attorneys propose recommendations to a 3-judge panel after a review of the briefs.

Courts with permissive standards for granting oral argument, or which grant oral argument every time it is requested, should seriously consider modifying their policies so that the deciding judges might exercise increased discretion not to hear cases they do not believe warrant oral argument. An illustrative example is a Third Circuit's internal procedure, which provides that oral argument is not required in cases where the facts are clear from the record, the facts are supported by the record, and the applicable law is established, the briefing is adequate, and no change in precedent is at issue.

Alternative Dispute Resolution - Settlement and Mediation Programs

Judges expressed their enthusiastic support for alternative dispute resolution and their settlement/mediation programs, and elaborated on the beneficial impact these techniques have had on their workload. Judge Jones went so far as to say that "arbitration and mediation has taken away from the federal courts a great amount of what was once considered the high-price-tag, sophisticated, challenging commercial law type dispute that was once the province of the federal courts." She felt that complex commercial litigation was proceeding more often through arbitration than through federal court litigation. Judge Roth of the Third Circuit testified that mediation programs have done a great deal to help the efficient operation of the courts, and to help settle cases without the additional time and expense of argument.

The use of settlement and mediation programs is strongly encouraged, and the courts are commended for their implementation of alternative dispute resolution techniques to resolve cases more quickly and efficiently. In fact, some have stated that a fully-functioning settlement office can resolve about as many cases as one judge. Many of the programs conserve judicial resources by utilizing the services of non-judges, and they improve case management by simplifying issues and resolving procedural matters. Settlement and mediation programs help streamline the appellate process, regardless of whether the cases actually settle. All 13 federal courts of appeal have implemented some process or formal program to help parties resolve issues rather than undergo a lengthy process of litigation. While each court employs settlement procedures or programs at different times during the appellate process, they usually are employed early in the appellate process before the filing of appellate briefs and oral argument. This practice allows the parties to settle prior to incurring substantial expense in filing briefing papers, and helps to narrow or clarify issues.

The programs vary in terms of eligibility requirements, some with criteria designed to identify those cases with the best prospects for mediation.¹¹ Some programs include all civil appeals,

¹¹ According to the 1997 Federal Judicial Center Mediation and Conference Programs in the Federal Courts of Appeals source book, the First and Second Circuits provide that nearly all civil cases, including administrative agency cases, are eligible for the mediation program. The Sixth and Federal Circuits provide that cases involving government agencies are not eligible to go through the process, but settlement discussions are held in nearly all civil cases meeting program eligibility requirements. The Third, Fourth, Fifth, Eighth, Ninth and District of

others consider only specific categories of cases, while others select cases by random draw. Some programs do not schedule pro se cases, petitions for writs of mandamus, or prisoner petitions. No programs include criminal cases. Courts also differ in terms of who mediates the appeals. In nearly all of the programs, staff and attorneys employed by the court conduct the conferences, although some courts do have senior federal judges or retired state judges who mediate cases. In the District of Columbia Circuit, the program director assigns cases to volunteer attorney-neutrals who meet the court's qualifications. In the Federal Circuit, settlement discussions are scheduled and conducted by the litigants' counsel.

Judge Seymour testified on the less obvious benefits of these settlement programs. In addition to settling appeals, she argued that some settlements are global in nature and result in the resolution of cases in district, bankruptcy or state courts. Other settlements may resolve a fundamental dispute between the parties and thereby forestall the filing of additional lawsuits. She also noted that settled cases by definition are never remanded for further proceedings in the lower courts, nor appealed to the United States Supreme Court. She estimated that if on average 15% of appeals are reversed and remanded, a district court is saved from processing 15 cases for every 100 settlements. Most significantly, mediation programs dispose of cases at a lower cost than by judicial decision. Judge Seymour calculated that each year, the Tenth Circuit's program resolves approximately as many cases as an additional appellate judge. It does so, however, at about two-thirds the actual cost of a chambers, and at just over half the expense of a chambers when associated costs of supporting a chambers are considered.

The federal judiciary is encouraged to look for additional areas of improvement in their settlement and mediation programs. Even more efficiencies may be achieved through studies of the statistical results of these programs, and the judiciary should explore whether changes in program eligibility requirements or the timing of these programs can increase court productivity further.

The Use of Senior and Visiting Judges

Most circuits supplement their allocated number of judgeships with senior judges. Senior judges are judges of the circuit who have retired from active and full-time status, but remain on the bench and may continue to hear a certain percentage of cases. Generally, to become a senior judge, an active judge must have reached the age of 65. By law, senior judges must maintain a minimal workload. 28 U.S.C. §371(f)(1)(A) - (C) (1994). However, this workload may consist almost entirely of administrative duties, with little or no caseload work. The senior judge determines the number of cases he or she wishes to hear, with the number of cases heard ranging

Columbia Circuits schedule conferences only in cases that appear likely to achieve settlement on some or all of the issues on appeal. Factors considered include the parties' expressed interest in settlement, complexity of the case, and amount of monetary relief. The programs in the Seventh, Tenth and Eleventh Circuits randomly select from a pool of civil case appeals meeting certain basic eligibility requirements.

from none to a full active judge's caseload. Consequently, to understand the actual number of judges available to address a circuit court of appeals' caseload at any given time, one must consider the number of active judges with the number of available senior judges, keeping account of the percentage of cases each senior judge is willing to hear.

The GAO report studying the impact of senior judges in the four circuits with pending judgeship requests before Congress (First, Second, Sixth and Ninth Circuits), Federal Judiciary: Information on Cases Assigned to Senior Judges in Fiscal Year 1997 in Four Circuit Courts of Appeals (GAO/GGD-98-17R, Nov. 30, 1998), concluded that for FY 1997, senior judges handled approximately 9% to 16% of the total adjusted case filings in each circuit. Specifically, the GAO report calculated that the senior judges for the First Circuit reduced by 9%, the senior judges for the Second Circuit reduced by 13%, the senior judges for the Sixth Circuit reduced by 15%, and the senior judges for the Ninth Circuit reduced by 16% the amount of cases that their courts' active judges would have had to handle in FY 1997.

The GAO study found that an accurate understanding of the impact of senior judges on a circuit's workload "depends upon the number of senior judges in the circuit and the caseload that they, collectively, are willing and able to undertake." Several factors determine how many cases a senior judge will hear, health and age being the most important factors. As of September 30, 1997, the number of senior judges who were age 76 or older in each circuit ranged from two in the Second Circuit to seven in the Ninth Circuit. The number of senior judges in a given circuit, and the case assignments they are willing to accept will vary from year to year. This number is further influenced each year by additional active judges who decide to take senior status, senior judges who decide to reduce their workload or decide to retire from the bench entirely, and senior judges who pass away.

When circuit requests for additional judgeships are evaluated, or when a determination is made whether to fill a vacancy, the number of senior judges and the caseload they handle are not factored into the numerical caseload formula. Rather, the Judicial Committee review process judgmentally considers the fact that the court has senior judges. Because of the significant role senior judges can play in handling a circuit's workload and case management, any circuit requesting additional judgeships or the filling of existing vacancies must clearly demonstrate that its needs are not being met by its current complement of judges, including senior judges.

Judges also indicated that their courts utilize visiting judges to deal with their workload. However, there was a difference in opinion in regard to the benefits of visiting judges. Some judges, like Chief Judge Hatchett of the Eleventh Circuit, maintained that the critical issue is whether courts can better service their litigants if they employ more active judges and fewer visiting judges, so there is a greater expertise in the circuit's law and a more stable legal regime. The Fifth Circuit prefers not to utilize visiting judges because of perceived problems of consistency and collegiality. Judge Posner indicated that the Seventh Circuit has discontinued the use of visiting judges in order to promote collegiality among the existing circuit judges, and to avoid having visiting judges participate in their en banc hearings. Judge Sloviter also testified that excessive use of visiting judges may have a negative impact on decisional consistency

within a court. However, some courts which have experienced an increased use of visiting judges, maintain that visiting judges can effectively improve the administration of justice in their courts. In fact, Judge Tjoflat indicated that courts primarily use visiting judges on argument calendars to decide cases which are common to all circuits: he argued that “we are comparing like things with all of the circuits.”

Visiting judges can be of significant assistance in helping courts manage their caseloads; however, visiting judges should be utilized only to the extent that they do not negatively impact consistency in the circuit law or court collegiality.

The Use of Staff Attorneys and Law Clerks

The judiciary should explore more effective uses of staff attorneys and law clerks for processing certain kinds of cases. All judges testified before the Subcommittee that judicial determinations lie solely with judges, not with their staff - even though some judges, in response to the Subcommittee’s 1996 Judicial Questionnaire, expressed varying levels of concern about increased reliance on law clerks and staff attorneys in drafting opinions and conducting other judicial functions. However, Judge Higginbotham noted that if one looks at the nature of the dockets of the courts of appeal, because they are dominated by prisoner petitions, staff counsel can more efficiently process these types of cases and, consequently, reduce the number of cases requiring judicial attention. He argued that because in some circuits more than 40% of the total workload of the court is attributable in some fashion to a prisoner petition, a court can be “left with sometimes 16 to 18 percent of the total workload.” Judge Higginbotham suggested increasing staff attorneys so that they can deal with the expanded prisoner petition caseload. He supported the use of staff attorneys for these kinds of cases, arguing that prisoner petitions primarily are handled at the district court level by magistrate judges. Judge Tjoflat also firmly believed that the solution to managing increased caseloads lay in providing judges with additional staff and automation resources. He felt that the limited substantive work done by staff attorneys and law clerks, while it does save judges considerable amounts of time, at the same time does not take away “judging” from the judges.

In fact, Judge Jones maintained that staff attorneys can actually enhance the quality of justice in some cases. She indicated that, in the Fifth Circuit, staff attorneys have the expertise to carefully review and prepare memoranda on prisoner filings, civil rights and habeas cases, and some of the direct criminal appeals. Ultimately, Judge Jones believed that these attorneys are “much more thorough in accomplishing this task than any other device”, including individual judge review. In regard to law clerks, Judge Hatchett suggested that they are so helpful in managing and reviewing cases that their numbers might be increased from 3 to 4 law clerks per judge. He noted that some judges now have career law clerks because they are so effective and efficient. Other courts place more restrictions on their use of staff. For example, the judges in the Tenth Circuit closely monitor the work of staff attorneys and law clerks through a “mentoring” program. Judge Sloviter testified that Third Circuit staff members are utilized primarily in motions panels, death penalty cases, and in preparing the record in pro se cases. She indicated that staff use is limited because of the court’s position that “a merits disposition requires judicial

rather than staff determination.”

As long as judicial determinations remain with the judges and not their staff attorneys or law clerks, further efficiencies can be obtained through the proper use of court staff in helping manage, review and process certain kinds of cases.

Non-Case Related Judicial Activities and Travel

Judge participation in non-case related functions and travel during the work week could be significantly reduced to help judges focus on completing their caseload. Completion of caseload should be the number one priority for judges, regardless of how beneficial these non-case related activities might be. Chief Judge Edwards of the District of Columbia Circuit stated that outside activities, such as teaching, scholarly writing and lecturing, serve the public and help make them “better judges.” To a certain extent, there are advantages to engaging in these kinds of extracurricular activities, and attending judicial conferences may be helpful in promoting interchanges between judges and lawyers on developments in the law.

Nonetheless, judges should avoid conducting these activities during normal working hours and should restrict their extracurricular activities on workdays, particularly when casework remains to be completed. For example, a number of judges responding to the 1996 Judicial Questionnaire found that judicial conferences were unnecessary and generally not helpful, while others recommended their total elimination. An objection to these conferences and other non-caseload related activities was their lost opportunity cost - as one judge put it, “time wasted when judges could be deciding cases.” In fact, the travel figures in the GAO study on Article III judges’ travel support this position. Clearly, the study demonstrates that a substantial number of days judges spent on non-case related travel instead could have been used to work on the court’s caseload.

In March 1998, the GAO released a detailed report on the non-case related judicial travel in those circuits which had requested the creation of additional judgeships for their courts or had experienced a judicial vacancy for more than 18 months. Federal Judiciary: Information on Noncase-Related Travel of Article III Judges in 6 Circuits and 34 Districts (GAO/GGD-98-67R, March 9, 1998). The GAO study analyzed travel which was not directly related to adjudicating cases for the First, Second, Fourth, Sixth, Ninth and Eleventh Circuit judges. Travel was classified into one of five categories: 1) judicial meetings and activities within the district or circuit; 2) workshops, seminars and other activities sponsored by Administrative Office of the U.S. Courts or the Federal Judicial Center; 3) meetings and conferences pertaining to courthouse construction; 4) judicial conference activities; and 5) other activities such as events sponsored by law schools, bar associations, civic associations, executive branch agencies of the federal government, or foreign governments.

The study found that the responding judges took a total of 1463 non-case related trips during the period from January 1, 1995 through September 30, 1997. This translated into a total workday loss of 3220 days; in other words, the federal judiciary missed well over 3000 days of work in a

period of less than 3 years, because judges in these circuits were traveling on non-case related matters. For example, during the period of January 1, 1995 through September 30, 1997, judges in the Second Circuit spent 343 working days on non-case related travel. Of those days, 201 days involved activities such as teaching law school classes or attending bar association seminars instead of hearing and deciding cases assigned to them. Yet, the Second Circuit declared a large number of “judiciary emergency days” (days on which visiting judges comprise a majority of the judges per panels) since the time of its Subcommittee hearing in September 1997. The First Circuit, which has requested the creation of an additional judgeship, had five judges conduct non-case related travel on 241 workdays over the course of the GAO study. The Sixth Circuit, which has argued vigorously that its one vacancy be filled and that it be granted two additional permanent and two additional temporary judgeships, reported that over the course of the GAO study, 11 of its judges took a total of 578 workdays for travel on non-case related matters. Based on these figures, it is evident that non-case related judicial travel consumes an unacceptable number of federal judiciary workdays. Judges should be working to reduce non-caseload travel and increase the amount of time they spend on their caseload. Any circuit requesting the creation of additional judgeships should first seek to reduce the days its judges miss due to this kind of travel.

Other Efficiencies - Temporary Judgeships and 2-Judge Panels

During the Subcommittee hearings, many suggestions were offered by the judges to promote convenience, efficiency and cost-effectiveness for both the court and litigants. Some judges, including Judge Roth and Judge Torruella, believed that because most of a judge’s time is spent reading and writing, advances in computer word processing, computer-assisted legal research, and electronic filings of briefs are probably where the greatest efficiencies can be made in the federal judiciary. Suggestions for efficiencies that came out of the responses to the 1996 Judicial Questionnaire and the Subcommittee hearings include: considering formal sharing arrangements and integration of courtroom, library and conference room space between federal and state courts; increasing telecommunications and teleconferencing rather than having judges travel or creating new places of holding court; allowing individual courts more discretion and cross-categorical control over choice in resources and expenditures and providing more incentives for courts to find cost savings; reviewing staff and administrative needs; and expanding alternative dispute resolution techniques and innovative court case management practices and programs.

The use of two Judicial Conference initiatives noted by Judge Gibbons in her testimony is strongly encouraged. First, the Judicial Conference recommends a temporary judgeship where the Judicial Conference has determined that the need for additional judgeships has been demonstrated, but it is not clear that the need for the additional judgeship will be permanent. The Judicial Conference has already recommended temporary, rather than permanent, additional judgeships for two circuits - the Sixth and Ninth Circuits. Second, the Judicial Conference has adopted a process for recommending that existing judicial vacancies not be filled. However, the Judicial Conference has not yet recommended to Congress that an existing vacancy should not be filled. Nevertheless, both these initiatives represent an effort to provide a balanced approach to assessing judgeship needs, one that recognizes that judgeships, once created, need not be

permanent, and vacancies may not always merit filling. These initiatives constitute a step in the right direction in terms of addressing court workload issues other than simply by increasing judgeships.

One of the more innovative proposals submitted was the idea of instituting a 2-judge panel process. Judge Newman of the Second Circuit urged the use of 2-judge appellate panels, subject to a rehearing by a panel of five judges in those infrequent occasions where the two judges of a 2-judge panel are divided. Currently, a court of appeals can form a panel of three judges with two visiting judges whenever the Chief Judge declares an emergency because of an unavailability of judges. Judge Newman thought that this mechanism of authorizing 2-judge panels was a far preferable way to relieve judicial emergencies rather than having panels of one resident judge and two visitors, and he did not believe that this practice would impair the “essential nature of the federal courts.”

Judge Newman mainly favored 2-judge panels because they can increase the number of dispositions by an appellate court without increasing the number of judgeships. He calculated that a shift from 3-judge to 2-judge panels could enable a court to dispose of 50% more appeals, although, theoretically, if the writing assignments from a 3-judge panel were fully redistributed to a 2-judge panel, the expected 50% gain in productivity could be achieved only by increasing the writing burdens on each judge by 50%. Yet, Judge Newman surmised that because a large percentage of appeals are disposed of by unpublished opinions, if a court were authorized to use 2-judge panels, the responsibility for preparing unpublished opinions would probably remain unchanged. As such, he calculated that the presiding judge or central staff would prepare the same number of unpublished opinions in a sitting week as is done with 3-judge panels. Judge Newman saw a redistribution problem to arise only as to published opinions, but he concluded that if each judge of a 2-judge panel were assigned exactly the same number of opinions as occurs on 3-judge panels, there still would be some increase in court productivity. Moreover, if the writing assignment was only slightly increased, the productivity of the court could increase significantly, approaching an increase in productivity of 50%. Because of the possible beneficial results of this proposal, the circuit courts, along with Congress, should explore the pros and cons of 2-judge panels and develop a pilot program to determine whether they are a viable option for federal court case management.

Limiting the Expansion of Federal Jurisdiction and Access to the Federal Courts

Many judges blamed Congress for contributing to the increase in the federal court caseload by expanding federal jurisdiction. Judges stressed that state courts are courts of general jurisdiction, while federal courts are courts of limited jurisdiction. Some judges suggested that Congress implement a judicial impact statement on the laws that it passes, because many issues should properly be considered by state courts. For example, judges expressed concern about the growing tendency of Congress to federalize criminal law enforcement. Judge Jones noted that the growth of the federal criminal caseload has strained judicial resources by imposing higher costs for probation and pretrial personnel, juries, indigent defense counsel and staff attorneys, and has directly affected the expediency with which civil cases are addressed. According to

Judge Jones, these developments also tend to increase the bureaucratization of the judiciary, diminish the attractiveness of federal judgeships, and reduce the appeal of federal courts as a forum for the efficient handling of sophisticated legal disputes. Recently, Chief Justice William Rehnquist of the United States Supreme Court in The 1998 Year-End Report of the Federal Judiciary also was highly critical of Congressional efforts to federalize crimes which have traditionally been covered by state laws. In fact, Justice Rehnquist warned that this trend in federalizing crimes “threatens to change entirely the nature of our federal system.”

Instead, judges encouraged Congress to restrict federal jurisdiction and refrain from creating new federal causes of action. Some felt strongly that such action would be preferable to increasing judgeships. Judge Tjoflat encouraged Congress to examine the federal courts’ subject matter jurisdiction and to study possible changes in the judiciary’s structure. He also suggested that the Federal Rules of Civil Procedure and the way they are applied be reexamined because they “yield an unacceptable level of cost and delay in the disposition of complex civil litigation.” Judge Newman agreed that Congress should resist creating new federal civil causes of action and federalizing crimes, and recommended that consideration should be given to the proper allocation of jurisdiction between the federal and state courts. Just as Congress has made the courts of appeal the “gate-keeper” for second habeas corpus petitions, Judge Newman suggested that role could be expanded to include the exercise of discretion with respect to other areas of federal court jurisdiction. Specifically, he felt that a “discretionary access” approach would be appropriate for diversity cases, as well as for many categories of federal question cases.

Judge Newman concluded that the answer does not lie with shortcuts in procedure, nor with delays in filling vacancies, because so long as Congress requires the federal courts to dispose of an increasing volume of cases within federal jurisdiction, he saw a justifiable need to add more judgeships. Rather, Judge Newman stated that the basic solution to the growth of the federal judiciary is the stabilization in the size of the federal court caseload and, ultimately, a reduction in that caseload. He urged Congress to control the size of that caseload by taking steps to stabilize and reduce the number of cases with federal jurisdiction.

Judges expressed support for the passage of legislation which limited federal jurisdiction or relieved the federal courts from the burden of frivolous lawsuits, such as the Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321 (1996). Other judges cited the tightening of habeas filings with the Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996), which imposes a much stricter standard for second and successive petitions. Some judges, like Judge Wilkinson, believed that it was more prudent to assess the effects of such legislation to lighten the federal caseload rather than to simply add more judges to the federal courts. Other judges, like former Chief Judge Arnold of the Eighth Circuit, felt that at least in the first few years, the Prison Litigation Reform Act and the Antiterrorism and Effective Death Penalty Act have actually increased the number of cases in need of review for financial determinations and issues of appealability.

Congress and the Administration hold part of the responsibility for expanding federal jurisdiction and impacting the federal court workload. While the Congress cannot be constrained from

legislating for the national good, it should pay more attention to determining the proper allocation of jurisdiction between the federal and state courts when looking to create new causes of action.

Conclusion

The Subcommittee hearings, responses from hundreds of circuit and district court judges to the 1996 Judicial Questionnaire, and numerous judicial writings on the subject, clearly indicate that the federal judiciary is ambivalent regarding the prospect of growth in the courts. Some judges believe that additional positions must be authorized to keep up with their increasing caseload, or the quality of justice will be diminished because of inordinate delays in judicial decision-making. Other judges believe that expanding the federal judiciary will create longer delays in decision-making, and that organizational and other efficiencies can be found to deal with the workload. These judges believe that an expanded judiciary can only have serious detrimental long-term effects on court collegiality and the consistency and quality of opinion-making. They believe that serious efforts should be made to stabilize the size of the federal judiciary.

With funding cuts and limited resources occurring in all areas of government, it should not be a surprise that Congress has intensified its efforts in scrutinizing how best to allocate funds in the federal judiciary, including whether existing vacancies should be filled or new judgeships created.¹² Congress should expend funds to fill an existing vacancy or to create a new judgeship only after a comprehensive determination has been made that filling a vacancy or creating a new judgeship is absolutely essential for the court to properly administer justice. Each court should make a convincing case that both its current composition of judges, and/or any additional judges it may be requesting, are absolutely necessary. Senior judges' actual workload should be formally factored into any judgeship determination. Further, judges in circuits seeking the creation of additional judgeship positions should seriously evaluate how much time they spend on non-case related travel and take steps to reduce such non-case related travel and other outside activities conducted during workdays. The creation of new judgeships, which are lifetime appointments, should be an action of last resort. In fact, Congress should be looking at terminating, or at least not filling, open seats which are no longer justifiable. Moreover, there should be a consensus within a court regarding any request to fill vacancies or to create new judgeships. Additionally, dissenting judges' opinions to a court's request for new judgeships should be forwarded to Congress for consideration. If individual judges believe their caseload is manageable and they feel that they can take on more work, that alternative is preferable to expending scarce resources to fill a vacancy or create a new judgeship.

It also should be noted that under the Omnibus Budget Reconciliation Act of 1990 ("OBRA"),

¹² According to a transcript from a conference on limiting the number of federal judgeships held on May 17, 1993, provided to the Subcommittee by the Federal Judicial Center, it is estimated that an average of \$18 million is spent per judgeship position over the life-span of a federal judge's tenure on a circuit court.

Pub. L. No. 101-508, 194 Stat. 1388 (1990), when Congress proposes to enact new mandatory spending, a procedural point of order arises against this proposal unless sufficient new revenues are provided to pay for the spending, or existing spending is decreased in an amount sufficient to pay for the new spending. The Congressional Budget Office considers the creation of additional judgeships to require new mandatory spending. Therefore, any request submitted by the federal judiciary to create additional judgeships should contain proposals for sufficient offsets to avoid a budget point of order. Congress should not act on any legislation creating new judgeships unless such legislation is appropriately offset. Of course, the elimination of an existing, yet vacant, judgeship is an appropriate offset for the purposes of obligation requirements and, as such, should be given serious consideration in order to comply with the OBRA.

Further innovative programs, administrative techniques, and alternative case management methods can be implemented to significantly reduce judges' workload, and assist in the ultimate goal of promoting efficiencies and cost savings in the federal judiciary. As found by the Subcommittee district court and appellate court reports on the 1996 Judicial Questionnaire and confirmed by the Subcommittee oversight hearings, federal judges concede that even further cost savings and efficiencies can be achieved. Consequently, Congress intends to explore, with the federal judiciary, the viability of proposals offered by individual judges. For example, Congress and the judiciary should explore the possibility of developing a pilot program to determine whether 2-judge panels are a viable option for courts to manage their workload. The Judicial Conference should make use of the process for requesting temporary rather than permanent judgeships where the need for a permanent judgeship is not clearly evident, and the process for recommending that existing judicial vacancies not be filled. It is encouraging that the federal courts and several judicial committees have recognized that alternative dispute resolution is an appropriate avenue to pursue and that they are currently looking at promoting such programs as part of an overall solution to the increased workload in the federal judiciary. Indeed, legislation was passed in the 105th Congress to require some form of alternative dispute resolution in every district court.¹³ However, notwithstanding all attempts to find and promote increased efficiencies within the federal court system, economy measures should be implemented in a manner that the effective administration of justice is not adversely impacted.

The Subcommittee hearings also highlighted a concern prominently voiced by the judges responding to the 1996 Judicial Questionnaire: that Article III jurisdiction has been inappropriately expanded to the point that it potentially impacts the efficient functioning of the federal judiciary and changes the nature of the federal system. Congress and the Administration share the blame for increasing the federal judiciary's workload, by creating new federal causes of action and expanding Article III jurisdiction, designating new places of holding court, and increasing the number of federal judgeships. Congress and the Administration should make every effort to determine whether issues are "truly federal" in nature and carefully evaluate the judicial impact of their legislative and executive goals.

¹³ Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, 112 Stat. 2993 (1998).

Currently, the federal judiciary is on a one-way glide path to growth. After two and one half years of intense study, it is clear that open-ended growth of the federal judiciary is neither feasible, nor desirable. While some courts could use additional help because of their increased workloads, further implementation of efficiencies and other alternatives must be considered before creating new permanent judgeship positions. Judge Wilkinson correctly stated that “inventiveness is stimulated when both Congress and the judiciary face the fact that increasing federal judgeships and expanding federal jurisdiction is not the first option.” Consequently, Congress should not act to fill vacancies or create new judgeships in a specific court of appeals unless there is a consensus among the judges of the court on the need to fill the vacancy or create new judgeships, the court’s caseload justifies this consensus, and the court has made every effort to identify and use all available efficiencies and court management techniques to avoid the need for filling the vacancy or adding new judgeships.